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No. 89-1782

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioners,

v.

NATIVE VILLAGE OF NOATAK, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF OF AMICI, THE STATES OF ALABAMA ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, WASHINGTON, WISCONSIN, WYOMING, SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Does the eleventh amendment bar to retrospective monetary relief apply to Indian tribes the same as it applies to all others?

2. Does the equal protection clause forbid a state to extend benefits to Indians and nonIndians alike?

INTEREST OF THE AMICI

The amici curiae are a selected portion of the fifty sovereign states of the Union. They join their sister state, Alaska, in urging reversal.

The principal interest aroused by the decision under review goes to the heart of their sovereignty: Can a state be sued over its objection based on a mere jurisdictional statute empowering district courts to hear the claims of Indian tribes? This interest has a special importance here compared to other sovereign immunity, eleventh amendment cases. Here, the court below surmised states had no immunity against Indian tribes that requires congressional abrogation, notwithstanding the tribes have a sovereignty that bars states absent congressional abrogation.

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SUMMARY OF ARGUMENT

The eleventh amendment immunity bar applies to Indian tribes to the same extent it applies to all others, no more and no less.

A state's immunity from suit is the rule. It is the point of departure for analysis. This Court overlooked this fact in 1793 (Chisholm). A shock wave was felt throughout the nation, and the eleventh amendment was born. Now it is firmly fixed that a state's immunity can be overcome only by an unmistakably clear state waiver or by an unmistakably clear congressional abrogation.

Indian tribes are equally subject to this rule. In 1794 Congress rejected a proposed exception to the eleventh amendment for treaty-based suits. This Court thereafter applied the rule against Indian tribes. When it listed exceptions to the rule of immunity, Indian tribes were conspicuously omitted.

There is good reason why the rule should be the same for Indian tribes as for others.

A state's own citizens are subject to the rule. The constitutional framers could hardly have intended to give Indian tribes greater standing against a state than the state's own citizens. Nor did the framers conceive of Indian tribes as sister states who are exempt from the rule of immunity. The constitutional plan of union required a federal judiciary for the peaceful resolution of disputes among the plan's participants. The tribes were not participants in the plan of union. Likewise, the framers did not conceive of the states as having less sovereignty than Indian tribes. Since sovereign immunity bars states from suing Indian tribes absent an unmistakably clear congressional abrogation, it must follow that tribes cannot sue states absent an unmistakably clear congressional abrogation.

The court below conceded that Congress has not abrogated the states' immunity with unmistakable clarity. But it held that states have no immunity if the plaintiff is an Indian

tribe; it concluded that the states' consent to Congress's plenary power over Indian affairs was a consent to suit. But the court's error was in thinking it was enough for Congress to have the plenary power. It is not enough. Congress not only must have the power to regulate and to abrogate state immunity, it also must exercise the power to abrogate the immunity defense and must exercise it with unmistakable clarity.

Nor can unmistakable clarity be dispensed with because the federal government might have sued on the Indians' behalf. It cannot seriously be contended that Indian tribes occupy the same superior status vis-a-vis the states as does the United States. The rule of immunity applies even when a plaintiff's suit can be said to further some federal purpose. And the rule, that the unmistakable clarity appear on the face of the statute, is palpably violated by looking to legislative history to find evidence that

Congress meant to allow Indians to sue as the federal government's surrogate.

Finally, healthy federal-state relations require unmistakable clarity for abrogation. States have political as well as legal means to protect themselves from suits by the federal government or by a sister state. But they are excluded from the political processes of a sovereign or quasi-sovereign entity outside the union. State opportunity to participate in the processes of the constitutional plan can be assured only if Congress must speak with unmistakable clarity before empowering another sovereign to invade state treasuries. Surrendering state immunity through equivocal committee reports disserves this federalism.

Turning from the eleventh amendment question to the issue of equal protection, the plaintiff tribes had no fixed property right in Alaska's revenue sharing bonus. Even less did they have a property right to exclude

others from sharing in the bounty. It turns the fourteenth amendment on its head to conclude, as the ninth circuit did, that sharing the bounty in a race-neutral way is forbidden racism.

ARGUMENT

I. THE ELEVENTH AMENDMENT BAR TO RETROSPECTIVE MONETARY RELIEF APPLIES TO INDIAN TRIBES THE SAME AS IT APPLIES TO ALL OTHERS.

A. Immunity is the rule.

The general rule is that states are immune from suit, absent waiver or abrogation. The eleventh amendment to the Constitution provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI. Although the terms of the eleventh amendment speak only to suits by "Citizens of another State, or by Citizens or Subjects of any Foreign State," the amendment's reach is far broader than those literal words. It reaches to enshrine the full notion of sovereignty itself, whether or not particular plaintiffs are within the

enumeration, and even as to suits grounded on federal law. Hans v. Louisiana, 134 U.S. 1 (1890). It reaches to affirm the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art. III" of the Constitution. Pennhurst State Schools & Hosp. v. Halderman, 465 U.S. 468, 472 (1987).

This Court once deviated from the rule of state immunity. In Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793), this Court said that citizens of another state could sue a state. A "'shock of surprise'" spread through the nation. Monaco v. Mississippi, 292 U.S. 313, 325 (1934) (quoting from Hans v. Louisiana, 134 U.S. 1, 11 (1890)). For "'[t]he suability of a State without its consent was a thing unknown to the law.'" Id. at 327 (Hans at 15). Justice Powell put it this way:

> The reaction to Chisholm was swift and hostile. The Eleventh Amendment passed both houses of

> Congress by large majorities in 1794. Within two years of the Chisholm decision, the Eleventh Amendment was ratified by the necessary 12 States.

Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 484 (1987) (footnote omitted).

Thereafter, immunity became the "'"point of departure"'" for analysis. Smith v. Reeves, 178 U.S. 436, 448 (1900). A citizen cannot sue his own state even though the amendment refers only to citizens of another state. Hans v. Louisiana, 134 U.S. 1 (1890). A corporation cannot sue a state, even a federally created corporation. Smith v. Reeves. Similarly, immunity bars suit by a foreign state though not within the express enumeration. Monaco v. Mississippi, 292 U.S. 313, 329 (1934). As stated by Chief Justice Hughes:

> Manifestly, we cannot rest with a mere literal application of the words of §2 of Article 3, or assume that the letter of the Eleventh Amendment exhausts

> the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention." The Federalist, No. 81.

Id. at 322-23 (footnote omitted). As stated by the federal court in Wisconsin,

> The [Supreme] Court does not consider it determinative that the entity seeking to sue is not one of those referred to specifically in the Eleventh Amendment. Rather, it looks to the nature of the protection granted the states.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin, No. 74-C-313-C (W.D. Wis. Oct. 11, 1990)(hereafter LCO v.Wisconsin), slip op. at 13. Immunity is the rule.

B. This Court has applied the rule of immunity to Indian tribes.

This Court has applied the rule of immunity to prevent tribal suits against states whenever the issue has come up.

In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), tribes sought to circumvent the eleventh amendment by claiming the status of a foreign state under this Court's original jurisdiction. This Court said the tribes were not foreign states. Chief Justice Marshall said the principle of immunity applied to an action by a tribe against a state. "[T]he framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states." Id. at 18. The Chief Justice added:

> At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of this

> tribe. . . . This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.

Id.

This Court's next occasion for applying the principle of immunity to tribes was nearly a hundred years later. In United States v. Minnesota, 270 U.S. 181 (1926), this Court held that the federal government was not barred from suing Minnesota on behalf of the Chippewa. Far from being obiter dictum, as the ninth circuit suggests, the holding was premised on its conclusion that the tribes could not themselves bring suit directly against a state.

> It must be conceded that, if the Indians' are the real parties in interest and the United States only a nominal party, the suit is not within this court's original jurisdiction.

Id. at 193.

> The reason the Indians could not bring the suits suggested lies in the general immunity of the state and the United States from suit in the absence of consent.

Id. at 195. This language has remained intact ever since. It recently was authoritatively cited in Arizona v. California, 460 U.S. 605, 614 (1983).

Moreover, when this Court listed exceptions to the rule, Indian tribes were conspicuously omitted. In an Indian context, this Court said:

> Of course, the immunity of the state is subject to the constitutional qualification that she may be sued in this court by the United States, a sister state, or a foreign state. . . . Otherwise, her immunity is like that of the United States.

United States v. State of Minnesota, 270 U.S. at 195.

The prominence of this longstanding precedent deserves especial weight in light of Congress' plenary power to abrogate state

sovereign immunity. "[F]or here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." Patterson v. McLean Credit Union, 109 S.Ct 2363, 2370 (1989).

The prominence becomes even greater when it is recalled that the issue of treaty-based suits was considered at the time the eleventh amendment was adopted. On January 14, 1794, Senator Gallatin would have amended the eleventh amendment to "except . . . cases arising under treaties made under the authority of the United States." Annals of the Congress of the United States (Pub. Gales and Seaton 1849) p. 30. At the time of this proposed exception, the role of states in relation to Indian treaties was very much on Congress' mind. Congress had just passed the NonIntercourse Acts to prevent states from making agreements with tribes that might conflict with federal prerogatives over Indian

treaties and other regulatory matters. See Oneida v. Oneida Indian Nation, 470 U.S. 226, 231-32 (1985). The Senate roundly rejected Senator Gallatin's proposal to exempt treaty suits from the eleventh amendment bar. The vote was 23-2. See Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 485 (1987); Annals of the Congress of the United States (Pub. Gales and Seaton 1849) p. 30.

C. The rule should apply to Indian tribes the same as it applies to others.

1. Since a state's own citizens are subject to the rule, so also are Indian tribes.

A citizen cannot sue his own state without consent or abrogation. Hans v. Louisiana, 134 U.S. 1 (1890). More than that: it would be absurd to suppose otherwise.

> Suppose that Congress when proposing the Eleventh Amendment had appended to it a provision that nothing therein contained should prevent a State from being sued by its

> own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Id. at 12 et seq. (quoted in Monaco v. Mississippi, 292 U.S. at 326; emphasis added).

If a citizen cannot sue his own state, the same must be equally true for Indian tribes.

2. The tribes do not come within the exception for sister states.

The ninth circuit reasoned that tribes are like states. Being like states, they fall within the exception to the immunity rule accorded to sister states. Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1163 (9th Cir. 1990).

Even were tribes like states, they could not recover money to benefit their members, as they attempt to do here. Sister states cannot

recover damages that benefit individuals, for example by claiming injury to the state's general economy, although they can sue to protect their sovereign state interests. See Hawaii v. Standard Oil Company of California, 405 U.S. 251, 258 n. 12, 264 (1972). Thus, to the extent they are like sister states, tribes' actions to recover money benefits for their members are barred.

More critically, tribes are not like states. The federal government makes treaties with nations, not states. Whereas the tribes originally were nations, they became domestic dependent nations as the colonies settled in, became the fledgling United States of America, and expanded westward. See The Cherokee Nation v. The State of Georgia, 30 U.S. (5 Pet.) 1, 16, 18 (1831). Thereafter they could not be considered states or nations. See United States v. Kagama, 118 U.S. 375, 385 (1885). Chief Justice Marshall said it had been "shown

conclusively that [a tribe is] not a State of the Union." The Cherokee Nation.

The ninth circuit's conclusion that Indian tribes are like states of the union is wholly devoid of merit. Sister states are exempt from the rule of immunity because they were co-partners in the constitutional plan of union. A federal forum to settle disputes between the states was "essential to the peace of the Union." Monaco v. Mississippi, 292 U.S. 313, 328 (1934). Exempting the federal government itself was "inherent" in the plan; without it "'the permanence of the Union might be endangered.'" Id. at 329. The tribes were not co-partners in the plan of union. That plan -- by which implied and express powers were given to a central government -- was by, between, among, for, and on behalf of states. The tribes had no part. The states did not consent to a union of tribes and sister states; nor did they consent to governance by

the federal government and the tribes. As the Seventh Circuit has said:

> The Constitution of the United States apportions sovereign power between the United States and the several states, not among the United States, the several states and the Indian tribes.

Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir. 1983).

It requires direct participation in the plan of union to benefit from the right to sue despite the eleventh amendment. In holding that the eleventh amendment bars a foreign state from suing, this Court said:

> The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a state, which inheres in the acceptance of the Constitutional plan, runs to the other states who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates.

Monaco v. Mississippi, 292 U.S. at 330. Precisely the same can be said of tribes. As stated by the federal court in Wisconsin:

> Implicit in the Court's analysis in Monaco is the idea that each state had as much to gain as it did to lose by entering into a union and submitting itself to suit by the other states and by the United States. It is this reciprocal benefit that forms the basis for inferring a waiver of the states' sovereign immunity from its "acceptance of the Constitutional plan." Although each state's sovereignty was diminished by surrender of its immunity to suit by other states, each state also gained the power to sue other states. At the same time, each state lost an aspect of its sovereignty by permitting the United States to sue it, but each state gained the security of knowing that the United States had the power to take action against an individual state that threatened the good of the nation.

LCO v. Wisconsin, 74-C-313-C (Western District of Wisconsin, October 11, 1990), slip op. at 18. Unquestionably, Indian tribes are not within this compact.

3. Since Indian sovereignty applies against the states, state sovereignty applies against the Indian tribes.

The ninth circuit's decision accords greater sovereignty to tribes than to states. A state cannot sue a tribe unless Congress has unequivocally waived the tribe's sovereign immunity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 172-73 (1977). But under the ninth circuit's holding, not only is there no requirement of an unmistakably clear abrogation, there is no state immunity to protect.

The constitutional framers would have been incredulous by this result. As stated by the federal court in Wisconsin:

> What is determinative is whether it can be inferred from the relationship established between the states and the Indian tribes in the constitutional plan that the states implicitly or necessarily waived their

> sovereign immunity and consented to be sued by Indian tribes. In my view it cannot be. Indeed, the natural inference is to the contrary, in view of the absence of reciprocal benefit and the states' reliance upon the federal government to mediate their disputes with the Indians. Therefore, I conclude that although the Eleventh Amendment makes no specific reference to suits against the states by Indian tribes, it must be read as precluding such suits.

LCO v. Wisconsin, slip op. at 20.

D. Congress' power over Indian affairs does not exempt Indian tribes from the rule of immunity.

1. Congress' power to regulate Indians does not empower it to abrogate state immunity.

This Court's 5-4 decision in Pennsylvania v. Union Gas Co., 109 S.Ct. 2273 (1989), held that Congress, when acting under its general commerce clause power, U.S. Const., art. I, sec. 8, may abrogate a state's immunity from

suit. But it does not necessarily follow that Congress may abrogate state immunity in Indian matters as well, even though Congress' Indian Commerce Clause power is located within the same clause of the Constitution as its general commerce power. For Indians have their own sovereignty; states may not sue them without a congressional abrogation. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 172-73 (1977). Unique issues of federalism are raised if a state cannot sue a sovereign when Congress allows that sovereign to sue the state.

If Pennsylvania v. Union Gas Co. logically means Congress can abrogate a state's immunity from suit by an Indian tribe, with or without abrogating the tribe's immunity from suit by a state, then Pennsylvania v. Union Gas Co. deserves prompt

rejection. The amici urge this Court to do so.[1]

The amici rely on the reasoning of the dissenters in Pennsylvania v. Union Gas Co. as to why Congress' power under Article I of the Constitution does not entail the power to abrogate a state's immunity from suit. There is another consideration as well. The federal government has no powers except as granted by the Constitution. The states, by contrast, have unlimited powers except as limited by the Constitution. See Garcia v. San Antonio Metro., 469 U.S. 528, 549-50 (1985). This elementary point of civics is inverted if the states with otherwise unlimited sovereignty can be sued over their objection by authority

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[1] The amici urge reconsideration only of that part of Pennsylvania v. Union Gas Co. that authorizes Congress to abrogate state immunity when acting under its Article I powers. The authority to abrogate under the fourteenth amendment, of course, has already been established. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

of the federal government whose power is delegated only.

2. Even if Congress has absolute power under the Indian Commerce Clause to abrogate state immunity, it must do so with unmistakable clarity.

The ninth circuit failed to appreciate this Court's two-stepped analysis: (1) Does Congress have power to abrogate immunity? (2) If Congress has that power, has it exercised it with unmistakable clarity? The ninth circuit mistakenly believed answering the first question would dispose of the second because the states surrendered their immunity when they gave Congress plenary power over Indian affairs.

But this mistake swallows the rule requiring abrogation by unmistakably clear language even where Congress' regulatory power is plenary. This Court requires answers to both questions. For example, Congress' power

of regulation in admiralty is complete, but this Court nevertheless has required abrogation of state immunity with unmistakable clarity in the language of the statute itself. Welch v. State Dept. of Highways and Public Transp., 483 U.S. 468, 474 (1987). Despite Congress' extensive regulatory power in bankruptcy, this Court nevertheless has held that a federal trustee cannot sue a state absent congressional abrogation in unmistakably clear language on the face of the statute. Hoffman v. Conn. Dept. of Income Maintenance, 109 S.Ct. 2818, 2822 (1989) (plurality). Similarly as to the commerce power itself: Even if the power to regulate commerce includes the power to override the states' immunity from suit, and even if the states consented to this power in the plan of union, this Court will not conclude that Congress has overridden this immunity unless it has done so clearly. Pennsylvania v. Union Gas Co., 109 S.Ct. 2273, 2281 (1989).

E. Sovereign immunity is not abrogated even if legislative history suggests tribes could sue in place of the federal government.

1. Even if legislative history could be examined, it is equivocal and not unmistakably clear.

The ninth circuit agreed §1362 does not meet the rule of unmistakable clarity for purposes of finding a congressional abrogation of state immunity. See Noatak, 896 F.2d at 1162, 1164. The statutory language on its face says nothing about abrogating state immunity.[2] And the rule of unmistakable clarity forbids inquiry into legislative history: the unmistakably clear abrogation

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[2] That statute provides that the district courts "shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

must appear on the face of the statute; resort to legislative history is not permitted. See Dellmuth v. Muth, 109 S.Ct. 2397, 2401 (1989).

Title 28 U.S.C. §1362 on its face is merely a jurisdictional statute. A statute that is merely jurisdictional does not create a cause of action or provide a remedy. See Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). Jurisdictional statutes do not create substantive rights or remedies against a sovereign. United States v. Testan, 424 U.S. 392, 398 (1976); Monaco v. Mississippi, 292 U.S. at 330. They do not empower district courts to formulate federal common law. See Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 640-41 (1981). The substantive right must be found in some source other than a mere jurisdictional statute. United States v. Mitchell, 463 U.S. 206, 215-16 (1983). Thus, far from abrogating a state's immunity from suit, §1362 does not even create a cause of

action or provide a remedy for a wrong by a nonsovereign.

Besides the facial infirmity of the statute to effect an abrogation of immunity, its legislative history is vague at best. Its principal purpose was to avoid the $10,000 jurisdictional limit of former 28 U.S.C. § 1331. And, in some ill-defined respects, it was to give the tribes the same access to a federal district court as the United States would have when suing on their behalf. See Annot., 65 ALR Fed. 649, 654 (1983); Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 559 n. 10 (1983); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 472 (1976). This Court characterized its history as equivocal. It was to provide "'the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys.'" Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 472 (1976).

> While this is hardly an unequivocal statement of intent . . . , it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under the Constitution, laws, or treaties" would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

Id. at 473 (emphasis added). Further:

> We think that the legislative history of §1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf.

Id. at 474 (emphasis added). These underscored words are terms of equivocation, not unmistakable clarity.

Thus, this Court already has ruled that §1362 does not meet the standard of unmistakable clarity, even if legislative history could be reviewed.

The Second Circuit, in reliance on Moe, concluded this history overcame the eleventh amendment defense. Oneida Indian Nation of

New York v. State of New York, 691 F.2d 1070, 1080 (2nd Cir. 1982). So did a number of district courts, see cases collected in Red Lake Band of Chippewas v. Baudette, Minn., 730 F. Supp. 972, 982 (D. Minn. 1990), despite an earlier Eighth Circuit decision upholding the immunity bar. Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974). But all those cases preceded[3] this Court's insistence that the unmistakably clear abrogation be inserted into the language of

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3 Red Lake is the sole exception, and it did not note the rule of facial explicitness. As stated in LCO v. Wisconsin, slip op. at 22:

> The [Red Lake] court did not discuss the effect of the Supreme Court's approach to abrogation, and it relied upon the Ninth Circuit's first opinion in Native Village of Noatak v. Hoffman, published at 872 F.2d 1384, holding that §1362 expressed an unmistakable intention to authorize Indian tribes to sue where the United States could sue on their behalf. This opinion was withdrawn and superseded by the opinion published at 896 F.2d 1157 . . . . For these reasons, Red Lake Band is of little help to plaintiffs' position.

the statute itself.[4] If this Court's insistence is obeyed, §1362 will be found not to abrogate the immunity defense. See LCO v. Wisconsin; Native Village of Venetie v. State of Alaska, 687 F. Supp. 1380 (D. Alaska 1988).[5]

Moreover, sovereign immunity was not an issue in Moe. This Court was engaging only in statutory construction of two jurisdictional statutes. It held that Congress intended to exempt Indian tribes from the anti-injunction act, 28 U.S.C. §1341, because the tribes could stand in the shoes of the federal government. Moe did not hold or state as dictum, imply or

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4 We note also that all those cases proceeded on the premise that the tribes are subject to the rule of immunity like everyone else, with the sole exception of the instant ninth circuit decision.

5 Native Village of Venetie was effectively overruled in the ninth circuit's first opinion, which later was withdrawn and superseded by the instant opinion. See footnote 3 above.

even meekly hint, that §1362 abrogates a state's immunity defense.

2. Immunity is not abrogated even if a plaintiff also serves a federal objective.

In the unlikely event this Court holds that §1362 is more than merely jurisdictional, the rule of immunity bars this suit anyway. It makes no difference if a tribe's suit is within the contemplation of a federal program or if a tribe is suing as the federal government's surrogate for relief the federal government could have obtained despite the eleventh amendment.

To illustrate, the eleventh amendment bars state employes' recovery of overtime pay owed to them by the state as their employer under the Fair Labor Standards Act (FLSA), 29 U.S.C. §216(b). It makes no difference that the federal government could have recovered the overtime pay for them. Employees v.

Missouri Public Health Dept., 411 U.S. 279, 285-86 (1973).

The rule of immunity applies to any federally based suit. Hans v. Louisiana. It is irrelevant even if the private plaintiff is serving some federal purpose when suing the state. In civil rights legislation, for example, Congress has provided for attorney's fees to prevailing private parties. Congress uses private parties as a means to discharge its power to implement the fourteenth amendment. The plaintiff stands as a "private attorney general." See Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (per curiam). Yet the rule of immunity bars the civil rights action against a state, absent an unmistakable waiver or abrogation, even though the private plaintiff is executing Congress' awesome power to enforce the fourteenth amendment against an unwilling state. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 244-47 (1985).

F. The principles of federalism require the rule that state immunity can be overcome only by an unmistakably clear abrogation on the face of the statute.

There are two principled reasons for insisting that Congress speak with unmistakable clarity before abrogating the immunity defense.

First, it is a most serious disruption of state-federal relations for Congress to authorize a damage suit against a state. This Court said in Atascadero, 473 U.S. at 242-43:

> Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain ... In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment.

See also Dellmuth, 109 S.Ct. at 2400 (abrogation of sovereign immunity "upsets the fundamental constitutional balance between the

Federal Government and the States" and places "considerable strain on the principles of federalism that inform Eleventh Amendment doctrine"). As stated in LCO v. Wisconsin, slip op. at 24:

> Under this broad interpretation of Eleventh Amendment immunity, it is Congress's abrogation of the states' sovereign immunity that upsets the balance of federal and state power. It is immaterial who benefits by gaining the ability to sue the states in federal court. It is just as much an invasion of the states' sovereignty and a change in the balance of state and federal power for congress to abrogate the states' immunity from suit by Indian tribes as it is for Congress to abrogate the states' immunity from suits brought by individuals.

Second, the rule of unmistakable facial clarity helps safeguard the states' opportunity to participate in the political processes of the plan of union to protect their interests.

> But, the principal and basic limit on the federal commerce power is that inherent in all

> Congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985). It disserves federalism generally, and state sovereignty in particular, to abrogate immunity based on inference upon inference drawn from committee reports.

And it is so easy for Congress to express itself unmistakably on the face of the statute!

II. THE EQUAL PROTECTION CLAUSE DOES NOT FORBID A STATE TO EXTEND BENEFITS TO INDIANS AND NONINDIANS ALIKE.

The ninth circuit held that a federal question of race discrimination was presented by Alaska's expanding its revenue sharing program, which had benefitted only

unincorporated communities with native village governments, to include all other unincorporated communities as well.

The plaintiffs alleged that they were authorized to receive their pro rata share of funds appropriated by the Alaska Legislature in a statute which provided "the state shall pay $25,000 to a Native Village government for a village which is not incorporated as a city under this title." Alaska Stat. §29.89.050. The plaintiffs also alleged that Alaska expanded the class of eligible recipients to include others solely because of the racial ancestry of individual members of the villages and that this decision violates federal equal protection, with the result that plaintiffs' share was diluted. The ninth circuit acknowledged that Alaska had no duty to vote a bonus of $25,000 to each Native Village. Noatak, 896 F.2d at 1165. It also acknowledged that the Commissioner's action was based on Alaska's "non-racial" criterion

for the distribution of state benefits. Moreover, as the dissent pointed out, Alaska's action was required by its own "equal protection and public purpose" clauses in its Constitution. However, the court ruled that changing the original scheme because the original classification was based "on [a] status [that] had an ethnic origin is itself a violation of the Constitutional command not to discriminate on the basis of race." To support its conclusion, the court said:

> Any governmental action based on the racial character of those affected is presumptively invalid. Washington v. Seattle School Dist. No. I, 458 U.S. 457, 485 (1982) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)).

896 F.2d at 1165.

But Washington v. Seattle School Dist. only held that an initiative which prohibited school boards from busing students for racial reasons, but permitted busing for virtually

every other reason, violated equal protection. This Court cautioned that:

> the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification .

458 U.S. at 483. This Court found, however, that:

> Initiative 350, however, works something more than the 'mere repeal' of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the state, by lodging decision-making authority at a new and remote level of government.

458 U.S. at 483. This Court continued:

> Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations.

Id. (emphasis added).

Thus, the Seattle School District decision was based on this Court's finding that the initiative burdened minority interests and that it was intended to do so. Also see Hunter v. Erickson, 393 U.S. 385, 387 (1969)(striking a referendum requirement for ordinances regulating real estate transactions on the basis of race, inter alia, because the referendum requirement was intended to, and did, burden minorities by making it more difficult to pass antidiscriminatory legislation).

Alaska, on the other hand, seeks race-neutrality. The tribes do not allege that the Commissioner's action was designed to accord disparate treatment; instead, they allege that the Commissioner was addressing the racial classification in the original enactment and that their share was diluted as a result. This is no more than a modification of an affirmative action program like that upheld in Crawford v. Los Angeles Board of Education,

458 U.S. 527 (1982). There, this Court found an amendment to the California Constitution, which prohibited state courts from ordering busing unless a federal court would do so to remedy a violation of the federal equal protection clause, did not violate the equal protection clause. This Court reasoned:

> The Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters (footnote omitted). This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.
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> * * *
>
> Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proved

unsuccessful or even harmful in practice. And certainly the purpose of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities (footnote omitted). Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects (footnote omitted). Yet these would be the results of requiring a State to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place.

458 U.S. at 538-540.

Plaintiffs miss Justice Blackmun's fundamental point that it is not racism to note racism in order to cure it. "[T]o get beyond racism, we must first take account of race." Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978)(Blackmun, J., concurring). Forbidden racism occurs only by closing off a class to others with race being

the dispositive determinant. See City of Richmond v. J.A. Croson Co., 488 U.S. 469(1989)(striking a city ordinance that set aside an unyielding 30% of construction contracts for minorities where race was the sole determinant); San Antonio School District v. Rodriguez, 411 U.S. 1, 20 (1973) (disadvantaged class suffered "absolute deprivation"); Frontiero v. Richardson, 411 U.S. 677, 687 (1973); (the "entire class" was deprived without regard to the abilities of individual members); and Loving v. Virginia, 388 U.S. 1, 11 (1967) (color was "the" test or the "sole" test).

It is an entirely different matter to consider the fact of race in order to help cure racism. See Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997(1990)(upholding benign race-conscious measures mandated by Congress, even if not remedial, especially if only a "plus" factor to be considered with others); McDonell Douglas Corp. v. Green, 411 U.S. 792,

802 (1973)(a factfinder must consider the race when applying the evidentiary rule that a plaintiff can establish a prima facie case by showing that he belongs to a racial minority); Furnco Construction Corp. v. Waters, 438 U.S. 567, 580 (1978)(the McDonell Douglas allocation of proof formulary that puts race into the calculus, is legitimate because "experience has proved that in the absence of any other explanation [discrimination] is more likely than not"); Teamsters v. United States, 431 U.S. 324, 339-42 (1977)(racial composition of work force can be considered as indirect evidence of employer bias).

Here, the Alaska Commissioner expanded the revenue sharing program to avoid a race-closing class forbidden by the Alaska Constitution. There is no claim that the Alaska Constitution has a disparate impact on minorities or even that it violates the equal protection clause. Therefore, the Commissioner's decision to comply with the

Alaska Constitution, and modify legislation in a neutral fashion to eliminate racial classifications, does not form a basis for an equal protection challenge.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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